No. 3703

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,

Defendant in Error.

BRIEF OF DEFENDENT IN ERROR

Upon Writ of Error to the United States District Court in the District of Arizona

O'SULLIVAN & MORGAN, of Prescott, Arizona, Attorneys for Defendant n Error.

Filed this.....day of....., 1921.

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Clerk U. S. Circuit Court of Appeals.

Servee of copy of withn Brief is acknowledged this.....day of September, 1921.

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Attorneys for Plantiff in Error.

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In conjunction with opposing counsel, we shall designate the parties "plaintiff" or "defendant," as they appeared in the Trial Court.

SUPPLEMENTARY STATEMENT OF FACTS.

Plaintiff (defendant in error) desires to make the following supplementary statement of facts, viz.:

Par. II. of Plaintiff's Complaint (Tr. p. 2) alleges:

> "That heretofore, to wit, on the 2nd day of June, 1920, and for a long time prior thereto, in the Verde Mining District, County of Yavapai, State of Arizona, the defendant corporation was the owner of, and was then and there operating and conducting a certain smelter and ore reduction works, together

with all appurtenances thereto belonging or in anywise appertaining, in the sampling, treating, reducing and smelting of ores and minerals. That defendant's said smelter and ore reduction plant, together with its appurtenances, did then and there consist of smelters, mills, shops, works, yards, plants and factories where steam, electricity and other mechanical power was then and there used to operate the machinery and appliances, in and about said smelter and ore reduction works and appurtenances aforesaid."

Par.III. of Plaintiff's Complaint (Tr. p. 2) alleges:

"That on, to wit, said 2nd day of June, 1920, and for some time previous thereto, plaintiff was and had been employed by defendant corporation as a laborer in what was designated and known as the 'Bull Gang;' that plaintiff, as directed by defendant corporation and as such employee in said 'Bull Gang," did work in and around said smelter and ore reduction works and in and around the mills, shops, works, yards, plants, factories and other buildings and appurtenances thereto belonging; that plaintiff's work as an employee of defendant corporation as aforesaid did consist of pick and shovel work, clearing up the yards, loading and unloading brick and lime, laying track for ore and slag cars, drilling holes in slag dumps, assisting in repairing said smelter and ore reduction works, together with the said appurtenances and in installing machinery, fixtures and equipments in said smelter and ore reduction works and appurtenances thereto."

Plaintiff, John T. Littlejohn testified that he had been employed in defendant's "Bull Gang" since

August, 1919, until June 2, 1920, the date he received the injuries complained of; that he did all kinds of work around the smelters, works and yards, "cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery," etc. That the smelter plant consisted of the smelter, sample mill, machine shops and other works; that the concrete pit and structure upon which he was working at the time of the accident was an addition to the sample mill; that the sample mill was used to crush ore for the smelter and the crushers therein operated by motor power. (Tr. p. 36.) That the concrete pit into which he fell was about ten feet wide and ten feet deep where the boards crossed it; that it was built as a conveyor to run ore from the rolls into the sample mill. (Tr. p. 37.)

On June 2, 1920, plaintiff and other employees were directed by defendant's foreman to install certain bolts in the said concrete structure, and thereupon, as directed, plaintiff did take one of the bolts and walked out on the staging with it in his arms for the purpose of placing it as directed; that he was obliged to walk on the planks placed over the concrete pit in order to install the bolt as directed; that the plank upon which plaintiff was standing broke, thereby precipitating him to the bottom of said pit, a distance of about ten feet; that by reason of said fall plaintiff sustained very serious and permanent personal injuries; (Tr. pp. 36-

37-38-39); that he was treated for fourteen days in defendant's hospital and then went back to work for the defendant and was kept at light work for seventeen days when he was "laid off" by defendant (Tr. pp. 38-39); that after said injury he only worked seventeen days as aforesaid; that he could only perform light work, and there was no such work available; that he could not do clerical work (Tr. pp. 42-43); that since the injury he slept good some nights and not at all other nights; that he never had insomnia before; that at the time of the trial he was still nervous, his hands and legs trembled, and he lost fourteen pounds in weight; that eight stitches were put in his head; that a company doctor told plaintiff that his skull was fractured; that flat three-cornered bones came out of plaintiff's skull as a result of his injuries (Tr. p. 44); that previous to the injury he had been in good health all his life; that he was earning $4.60 per day at the time of his injury; that he earned no money since except for said period of seventeen days. (Tr. p. 43).

In September, 1920, Dr. J. B. McNally, a physician and surgeon of Prescott, Arizona, made a thorough examination of plaintiff's physical condition, and testified to the result of said examinaton. We call this Honorable Court's special attention to the testimony of Dr. J. B. McNally on direct and cross-examination (Tr. pp. 44-47).

During the trial defendant's physicians were per-

mitted to make a thorough physical examination of plaintiff's head (Tr. pp. 57-60), and to test his pulse (Tr. p. 72), which ranged from 128 to 134. Defendant's physician testified that in a man of plaintiff's age his normal pulsations should be from 80 to 90, sitting. (Tr. p. 72).

The cause of the accident and injuries to plaintiff was substantiated by eye witnesses (Tr. 47-48-49), and was not controverted in any way by defendant.

Plaintiff's physical condition before and after the injuries received was shown by Harry Garrison (Tr. pp. 51-52) and by plaintiff's wife, Sarah Littlejohn, (Tr. pp. 52-53-54).

From the evidence introduced. it appears beyond any doubt that plaintiff was seriously and permanently injured. The American Mortality tables introduced in evidence gave his life expectancy at sixteen and one-half years (Tr. p. 57). His earning capacity at the time of the injury was $4.60 per day (Tr. p. 43) which would amount to over $1600.00 per annum or a total in excess of $25.000.00 during his life expectancy. The jury awarded him damages in the sum of $8000.00, which included his loss of time from June 2, to November 26, 1920, the date of the trial.

PLAINTIFF'S REPLY ARGUMENT.

(A) Defendant's Assignments of Error numbered

I. and II., Relating to Special Damages: (Tr. p. 100).

Proposition I.

The reasonable value of working time lost by an employee and diminished earning power, directly resulting from the injury, are all matters of actual loss and as such are recoverable.

Arizona Copper Co. v. Burciaga, 20 Ariz. 85-94; 177 Pac. 29.

See **Inspiration Con. Cop. Co. v. Lindley,** 20 Ariz. 95-101; 177 Pac. 24; 8 R. C. L. 477.

Arizona Eastern R. Co. v. Bryan, 18 Ariz. 106-118; 157 Pac. 376; **17 C. J.,** Sec. 106 p. 780.

> "The pecuniary value of time lost by plaintiff in consequence of the injury is a proper element of recovery, where the existence and amount of the loss is established with the requisite certainty. It has been held, however, that wages lost are not recoverable as such, but that in cases where it is permitted to prove the amount of wages lost, such evidence, is admissible as a measure of the value of plaintiff's time of which he has been deprived. * * * * "
>
> 17 C. J., Sec. 106, p. 780-81.
>
> All damages for loss of time up to the date of trial may be recovered. 17 C. J., Sec. 106, p. 781.
>
> "The element of loss of time is held properly to include only such loss as has accrued up to the time of trial, a subsequent loss of time is to be included in a recovery for de-

creased earning capacity. Hence a recovery both for loss of time and for impairment of earning capacity is not a double recovery. * * * * *" 17 C. J., Sec. 106, p. 781.

PLEADING SPECIAL DAMAGES

The rule is stated in 17 C. J., Sec. 312, p. 1014, under the title "Damages," as follows:

> "In some jurisdictions it is necessary, in order to admit proof of loss of time, or loss of earnings for a time, that the loss be specially pleaded. In others it would seem that proof of this nature is admissible without a special allegation. But even in those jurisdictions in which particularity of averment is ordinarily required, it has been held that where the injury alleged would necessarily import a loss of time, a more direct averment may be dispensed with. Regardless of this conflict of authority, plaintiff is not entitled to recover for loss of time where, instead of asking damages generally for the injuries sustained, he specifies the elements of damages for which he seeks recovery and omits to mention the element of loss of time. * * * * * *" 17 C. J., Sec. 312, p. 1014.

> "The general rule is that to permit a recovery of special damages they must be particularly averred in the complaint. This is true whether they result from tort or breach of contract, and the rule applies in equity as well as at law. * * * * *" 17 C. J., Sec, 306, p. 1002.

MOTIONS TO STRIKE

Motions to strike are not favored and will be granted only in a clear case. 16 Cyc. 616.

It is discretionary with the Court whether to grant or refuse a motion to strike out allegations of a pleading. 16 Cyc. 643.

Defendant's objection to plaintiff's allegations of special damage for loss of time is palpable hypercriticism.

(B) Defendant's Assignments of Error numbered III. and IV., Relating to the Overruling of Demurrers to Plaintiff's Complaint. (Tr. p. 10-11. Discussed in Brief of Plaintiff in Error, pp. 18-25).

Defendant contends that the allegations in paragraph III of the Complaint show that plaintiff was not engaged in a "hazardous occupation in mining, smelting," or "in any other industry."

Pertinent Arizona Statutes Relating to Hazardous Occupations.

Par. 3147, Civil Code, Arizona, 1913, provides:

"Employment in all underground mines, underground workings, open cut workings, open pit workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills, concentrating mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills and at coke ovens and blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

Par. 3155, Civil Code, Arizona, 1913, provides:

"The labor and services of workmen at manual and mechanical labor, in the employ-

ment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

"By reason of the nature and conditions of and the means used and provided for doing the work in said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and are unavoidable by the workmen therein."

Par. 3156, Civil Code, Arizona, 1913, provides:

"The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

* * * * * * *

"(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

* * * * * * *

"(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises."

Par. 3158, Civil Code, Arizona, 1913, provides:

"When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions

> of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be lable in damages to the employee injured. * * * * "

The Complaint herein was drafted to come within the purview of the foregoing provisions of the Arizona Liability Law, "For Injuries to Workmen in Dangerous Occupations." It specifically alleges that "steam, electricity, and other mechanical power was (were) then and there used to operate the machinery and appliances in and about said smelter and ore reduction works and appurtenances aforesaid." (Par. II.).

Plaintiff's status at the time of the accident is covered by the provisons of subdivisions (8) and (9) Par. 3156, supra, and upon said provisions the complaint was drafted.

NOTE: With all due respect to counsel for defendant, we consider ourselves greatly burdened in attempting to present a logical Brief in this case, and at the same time follow counsel's argument. It seems to us that opposing counsel should have presented their Assignments of Error, and argument thereon in a more logical and orderly manner.

Therefore, in order to dispose of the "Hazardous Occupation," proposition raised by demurrer and by motion for a directed verdict, we will now

discuss Defendant's Assignment of Error No. XI. (Tr. p. 103), and will notice the authorities cited in support of said Assignments of Error Nos. III. and IV. aforesaid.

(C) Defendant's Assignment of Error No. XI. (Tr. p. 103) relating to "Hazardous Occupations."

Defendant, in its Brief, claims that plaintiff was not engaged in a hazardous occupation as comtemplated by the Statutes of Arizona, at the time he received the injuries. Defendant also asserts that the evidence fails to show that the accident occurred by reason of an "inherent risk and hazard, unavoidable and due to a condition of the employment in a hazardous occupation." (Brief of Plaintiff in Error, pp. 45-50.)

Proposition II.

A workman employed to perform manual labor of any kind in or about open pits, ore reduction works or smelters; or in mills, shops, yards, plants or factories where steam, electricity or any other mechanical power is used to operate machinery or appliances in or about such premises, is engaged in a Hazardous Occupation as contemplated by the Arizona Liability Act.

Pars. 3155 and subdivisions (8) and (10) Par. 3156, Civil Code, Arizona, 1913.

Boody, Admrx. v. K. & C. Mfg. Co., 77 N. H. 208; 90 Atl. 860; L. R. A., 1916 A., 10; Ann. Cas. 1914 D., 1280. Petition for re-hearing denied.

In re **Larsen,**

In re **Paine Drug Co., et. al.,** 218 N. Y. 252, 256; 155 N. Y. Supp. 759; 112 N. E. 725.

O'Toole v. Brandram-Henderson, 48 Nova Scotia, 293; 21 Dom. L. R. 83.

Pellerin v. International Cotton Mills, 248 Fed. 242.

Matter of White v. N. Y. C. & H. R. R. R. Co., 216 N. Y., 653; 110 N. E. 1051, Affirmed in United States Supreme Court March 6, 1917.

N. Y. C. R. Co. v. White, 243 United States 188; 37 Sup. Ct. 247; 61 L. Ed. 667.

Calumet & Arizona Mining Co. v. Chambers, 20 Ariz. 54; 176 Pac. 839.

Inspiration Con. Cop. Co. v. Mendez, 19 Ariz. 151; 166 Pac. 278.

Suburban Ice Co. v. Industrial Board, 274 Ill. 630; 113 N. E. 979.

Gibson v. Industrial Board, 276 Ill. 73; 114 N. E. 515.

Armour & Co. v. Industrial Board, 273 Ill. 590; 113 N. E. 138.

Parker-Washington Co. v. Industrial Board, 274 Ill. 498; 113 N. E. 976.

Chicago Dry Kiln Co. v. Industrial Board, 276 Ill. 556; 114 N. E. 1009.

Chicago Cleaning Co. v. Industrial Board, 283 Ill. 177; 118 N. E. 989.

Fogarty v. National Biscuit Co., 221 N. Y. 20; 116 N. E. 346.

Dose v. Moehle Lithographic Co., 221 N. Y. 401; 117 N. E. 616.

A few extracts are made from the opinions of the Courts in some of the cases above cited, which will suffice to show the rule of law applicable to said proposition II.

BOODY, ADMRX., v. K. & C. Mfg. Co. supra, (L. R. A. 1916 A., 10 (N. H.).

Deceased was employed to work around a manufacturing mill. Among other things, his duties required him to clean the racks constructed to catch rubbish coming down the mill race to defendant's mill. On the morning of the accident, he was seen standing on a walk with his back to the stream attempting to pull rubbish out of a rack. Later, his body was recovered from the river below the mill and a broken rake was found in the flume, and a freshly broken rake handle was found in the river.

One of the employments described in Section 1 of the New Hampshire Workmen's Compensation Act was:

> "work in any shop, mill, factory or other place on, in connection with, or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power, in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor."

The defendant contended that at the time deceased met his death, he was not employed in a hazardous occupation as contemplated by the Statute. On this point, the Supreme Court of New Hampshire said: (L. R. A. 1916 A., 12).

> "It will be helpful, when considering the question, to remember that it is the office of Sec. 1 to limit the workmen who come within the operation of the act, and of Sec. 2 to describe an accident that will entitle such workmen to its benefits. In the final analysis, the defendant's contention is that the words "workmen engaged in . . . . work in any shop, mill, factory, or other place, on, in connection with, or in proximity to," power-driven machinery, are descriptive of an accident, not an employment, which will bring a workman within the operation of the act, or that those words were intended to limit the accidents that will entitle those engaged in such work to the benefits of the act. The act, however, says that it applies "to workmen engaged in manual or mechanical labor in the employments described in this section," not to those who are injured while engaged in any one of those employments by the particular risk which induced the legislature to include those engaged in it within the operation of the act."

The Supreme Court of New Hampshire held that the defendant was liable for damages. A petition for rehearing was denied. The Boody case, supra, seems to be a leading case on the proposition involved and it has been frequently cited and approved by other courts.

IN RE LARSEN, 112 N. E. 725 (N. Y.), the deceased was employed in the capacity of porter, elevator, and handy man, and his work consisted of the ordinary work of a porter and elevator man. He was employed by a drug company engaged in manufacturing and selling drugs, chemicals, medicines and pharmaceutical preparations at both retail and wholesale, which was a hazardous occupation, as provided by the New York laws. Deceased, at the time of his death, was engaged in building a shelf in his employer's place of business, lost his balance and fell down the elevator shaft by reason of which he was instantly killed. The Court of Appeals of New York City, by a unanimous opinion, decided that the Drug company was liable in damages for the death of the deceased. The Court, speaking through Hiscock, J., says: (112 N. E., 726-7).

> "Appellants' second proposition means that a person engaged generally in an employment which has been defined as hazardous cannot recover compensation for injuries received while performing some act not immediately connected with what might be deemed the hazardous and characteristic feature of the business, although such act was incident to the employment and necessary in prosecuting and carrying forward the business. To illustrate, in the present case it means that no award can be made because the employee was injured while building a shelf for use in the business, rather than engaged in the immediate process of manu-

> facturing drugs and chemicals, although such shelf was entirely necessary in the prosecution of the business. We think this is too narrow a view of the statute, and would lead to limitations upon its application which were not intended or anticipated by the Legislature. It is not necessary to attempt to lay down a final and universal rule on that subject. We feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.
>
> The order should be affirmed, with costs."

O'TOOLE V. BRANDRAM-HENDERSON, supra, (21 Dom. L. R. 83.) Under the Nova Scotia Workmen's Compensation Act, compensation is allowed in respect to an injury to a teamster while driving a truck and a team of horses in the delivery of the output of the factory, although at some distance therefrom, the horses and truck being a part of the factory "plant" under the extended meaning given by No. 2 subs 2 to the word "factory," so that an injury "on, in or about" any part of the plant is within the statute.

PELLERIN V. INTERNATIONAL COTTON MILLS, supra, (248 Fed. 242).

Plaintiff had been employed in defendant's cotton mill for several years. He had also done the ordinary repair work which a carpenter would do either in a carpenter shop located in one of the mill buildings or wherever he was sent to do repair work about the mill. He did not, however, receive the injury for which he sued while working on or in connection with machines of any kind, nor was it received in any building containing machinery. He was injured by falling from a platform adjoining and appurtenant to, and outside of, one of the mill buildings, under directions to get a certain fellow employee to help him and to carry with such help a wooden cupboard then on said platform into a room in the building and there put it up. He and the fellow employee were trying to lift the cupboard and turn it on the platform so as to get it through the door and into the room where it was to be put up. Plaintiff's claim was that the fellow employee negligently allowed the cupboard to strike the wall of the building and that he was thereby caused to lose his footing on the platform and fall to the ground about three feet, seven inches below the level of the platform, whereby he was injured.

The New Hampshire statutes applicable to the case are quoted in the opinion as follows: Section 1:

> "workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, condi-

> tions or means of prosecution of said work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid."
>
> "(b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor."

This Honorable Court will observe that the Arizona statutes are much broader and more comprehensive than the New Hampshire Statute, in that they include "all work in or about * * * ore reduction works and smelter."

"All work in mills, shops, works, yards, plants and factories * * * * *" (Subdivisions 8 and 10, paragraph 3156, Civil Code Arizona, 1913.)

The Circuit Court of Appeals, First Circuit, in said Pellerin case held:

> "It is the work included in the scope of the plaintiff's employment which here controls, and not the character of the particular work being done by him under said employment at the particular time of his injury."

Also held that the word "mill," as used in the statute "includes not only the buildings wherein the "work" is done, but everything appurtenant

to them, as a dam, flume, yard or ways provided for use by employees." citing Boody v. K. & C. Mfg. Co. supra.

In the case at bar, it will be observed that on June 2, 1920, the day of the accident involved, plaintiff and five other employees were taken over by defendant to its sample mill where said employees "jacked up the rolls" (machinery), the rolls being the iron machinery used to crush defendant's ore, and are operated by motor power. (Tr. p. 36.)

SUBURBAN ICE CO. V. INDUSTRIAL BOARD, supra, (113 N. E. 979, Ill.), HELD, That where a teamster employed by an ice and fuel company, whose duty it was to deliver ice and fuel and work in and around the place and care for the horses of the company, was kicked by one of the horses and died from the effects thereof, his widow and administratrix could recover under the provisions of the Workmen's Compensation Act. We quote the following lucid excerpt from the opinion in said case: (113 N. E., 981-2.)

> "Considered in the most favorable light for plaintiff in error's argument on this point, the work in which the deceased was engaged was a part of the occupation or enterprise of the plaintiff in error. The entire act and its purpose must be considered in order to reach a reasonable conclusion as to the meaning and construction of any of its provisions.

> "The men in the building of plaintiff in error where the machinery was located and the ice manufactured were certainly within the act. The workmen around the building and caring for the property were within the act. Those whose duties took them to the plant to take away the product were within the act, and we can reach no other conclusion than that the duties of the deceased were of such a nature, so related to and connected with the occupation of plaintiff in error, as to require that plaintiff in error, under the provisions of the Workmen's Compensation Act, shall be held liable for the injury."

GIBSON V. INDUSTRIAL BOARD, supra, (114 N. E. 515, Ill.). The statute involved was Clause 6 of paragraph (b) of Section 3 of the Illinois Workmen's Compensation Act, which declared a hazardous occupation "any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

In that case a teamster in the employ of a company engaged in selling and delivering gasoline was fatally injured from a fall while returning home after delivering gasoline, when he attempted to raise the canopy top attached to the seat and from being run over by the wagon. HELD, that the fact that the accident did not result from the explosive product which he carried did not prevent him from being under the Workmen's Compensation Act, or preclude his widow from recovering compensation.

ARMOUR & CO. V. INDUSTRIAL BOARD, supra, (113 N. E. 138, Ill). HELD, that widow of a

teamster and employee of the Armour Packing Company who died as a result of injuries received from falling from his wagon while delivering goods to his employer was entitled to compensation for the death of her husband.

PARKER-WASHINGTON CO. V. INDUSTRIAL BOARD, supra, (113 N. E. 976, Ill.). HELD, that a teamster employed by a teaming company, which had contracted to deliver a quantity of crushed stone to a contracting company engaged in street paving, while standing up and reaching over to whip the horses he was driving, lost his balance and fell under the wheels of the wagon and was killed, that the employer was liable under the Workmen's Compensation Act.

CHICAGO DRY KILN CO. V. INDUSTRIAL BOARD, supra, (114 N. E. 1009, Ill.). HELD, that a watchman employed in a planing mill was entitled to compensation for injuries received while protecting the property at the plant from suspected persons.

CHICAGO CLEANING CO. V. INDUSTRIAL BOARD, supra, (118 N. E. Ill.). HELD, that the cleaning and washing of windows is a hazardous occupation and is under the Workmen's Compensation Act, included in the business of "maintaining any structure." We quote the following excerpt from the opinion in said case:

"The business of washing windows, as

> such, in large cities, is as much a part of the maintenance of buildings as would be the replacing of glass in windows, the painting and decorating of the buildings, or the repointing of the outside where the mortar between the bricks was giving way. No one can seriously question but that those engaged in any of such businesses and employments would come under the act."

FOGARTY V. NATIONAL BISCUIT CO., supra, 116 N. E. 346, N. Y.). The National Biscuit Company was engaged in the bakery business, designated as "hazardous" under the Workmen's Compensation Law. Plaintiff was employed by the Biscuit Company as a night watchman. His duties were to patrol the buildings. He was injured in the line of his duty. HELD, that he was entitled to compensation.

DOSE V. MOEHLE LITHOGRAPHIC CO., supra, (117 N. E. 616, N. Y. Moehle Lithographic Company was engaged in the business of lithographing and printing, classified as "hazardous" in group 40, section 2 of the Workmen's Compensation Law of the State of New York. Business of the company was carried on in a plant maintained by it for that purpose. The plaintiff was employed by the company as a bricklayer to point up one of the walls of its plant and repair cracks therein. One of the ropes supporting a scaffold upon which he was working broke and precipitated him to the ground, a distance of some thirty feet, whereby he was injured.

He was awarded damages by the Industrial Board. The company and its insurer appealed from the determination of the Industrial Commission. On appeal the determination of the Industrial Commission was reversed and the claim dismissed. The plaintiff then appealed to the Court of Appeals of New York, with the result that the order of the Appellate Division of the New York Court was reversed and the determination of the State Industrial Commission was affirmed. We quote the following excerpt from the opinion in said case: (117 N. E. 617.)

> "The injury received by Dose was accidental, and sustained by him as an employee in the service of the company which carried on a hazardous employment. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not, in justice to itself, its business or its employees, continue business in a plant which was actually unsafe, or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company, and under the law as amended was clearly entitled to compensation."

N. Y. CENTRAL R. CO. V. WHITE, supra, (243 U. S. 188. A night watchman in the employ of a railway company was injured while in the performance of his duty to guard tools and materials intended to

be used in the construction of a new railway station. The Workmen's Compensation Commission of New York awarded him compensation. The Court of Appeals of that state affirmed the award. The railroad company, on writ of error, took the case to the U. S. Supreme Court where the judgment of the lower court was affirmed.

ARIZONA CASES

IN INSPIRATION CON. COP. CO. V. MENDEZ, supra, (19 Ariz. 151-161) the Supreme Court of Arizona said:

> "The conditions occurring which create liability to respond in damages are: That the person injured must be in the service of the proprietor carrying on the hazardous industry; that the industry to be dangerous and hazardous must be one which fairly comes within one or more of the industries enumerated in paragraph 3156; that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment; * * * "

From the foregoing excerpt, it will be seen that the test is: "That the person injured must be in the service of the **"proprietor carrying on the hazardous industry;"** and in addition, **"that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment."**

Tested by this rule, can there be any question

that plaintiff is entitled to recover under the Arizona Liability Law?

CALUMET & ARIZONA MIN. CO. V. CHAMBERS (20 Ariz. 55), supra. In this case, the complaint alleged, inter alia, that at the time of the accident the plaintiff was in the service of the defendant engaged in performing his duties about the said smelter, including the duty "* * * in the event of an emergency or accident to assist and aid in restoring conditions and putting things in working order." (p. 58). The cause of the accident was alleged in the complaint (p. 59) as follows:

> "That on the fifteenth day of January, 1915, while plaintiff was engaged in assisting other coemployees to adjust a car to the track from which it had been thrown in some unexplained manner, not important, " . . . and which plaintiff was assisting and aiding in putting the said car back on the tracks," the car was made to appear to plaintiff as in the act of turning over on him, and plaintiff in order to escape from injury by the overturning car jumped, 'and as he jumped he caught his foot on an iron bar and fell into an open slag spout, and by reason thereof plaintiff received serious injury to his right leg. * * * ' "

The Court then observed:

> "This language, stripped of its many qualifying adjectives, sets forth the fact that the plaintiff, while assisting other employees to replace a fettle car on a track, believed the car was overturning and falling on him, and,

in order to escape from the falling car, plaintiff jumped and fell striking an open slag spout, thereby seriously injuring his leg. * *"

"Consequently, the accident was occasioned by an accident arising out of and in the course of plaintff's labor, service, or employment and due to a condition or conditions of such occupation or employment. * *" (p. 60.)

The judgment of the lower court was affirmed.

Proposition III.

Where an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

The above proposition is taken from the opinion of Hiscock, J., in an action arising under the New York Workmen's Compensation Law, and is fortified by the concurrence of all the Judges of the Court of Appeals of New York, in **Matter of Larsen v. Paine Drug Co.**, 218 N. Y. 252, 256; 112 N. E. 725, 727. (Decision May 12, 1916.)

The above proposition has been adopted, cited and approved in subsequent cases. See the following:

Fogerty v. National Biscuit Co., supra, 116 N. E. 346 N. Y.

Dose v. Moehle Lithographic Co., supra, 116 N. E. 616 N. Y.

Waters v. Taylor, 218 N. Y. 248; 112 N. E. 727; L. R. A. 1917 A., 347.

Deyo v. Arizona Grading & Construction Co., 18 Ariz. 149; 157 Pac. 371.

Vogt v. Southern Coal, Coke & Mining Co., 210 Ill. App. 620.

White v. East St. Louis R. Co., 211 Ill. App. 14

Defendant, in the case at bar, was engaged in a hazardous occupation, to wit, operating ore reducton works and smelter, consisting of mills, shops, works, yards, plants and factories. Plaintiff had been employed to do all sorts of work in and around the smelter plant, such as "cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery," etc. (Tr. 36). Obviously, this work was necessary in carrying on the business of the defendant.

The law on this particular point is well stated in GIBSON V. INDUSTRIAL BOARD, supra (114 N. E. 515 N. Y.) as follows:

> "Plaintiffs in error were engaged in a business that was extra hazardous under the act, and the deceased was working for them as a driver of one of their wagons. Such work was necessary in carrying on the principal business of the plaintiffs in error. We think

> the occupaton of the deceased sufficiently connected with the extrahazardous business of the plaintiffs in error, and, such business being under the act, his widow was entitled to recover under its provisions.
>
> "The judgment of the circuit court will be affirmed. Judgment reaffirmed."

IN DEYO V. ARIZONA GRADING & CONSTRUCTION CO., supra, (18 Ariz. 149-155), an action for damages under the Employer's Liability Law, Chief Justice Ross used this language: (p. 155).

> "The grade or station of the employee or the kind of work being performed by him, was of any consideraton the important thing being that the employee was 'in the service of such employer' in some hazardous occupation at the time of the injury or death.'

The provisions of Employers' Liability and Compensation Acts are construed liberally by the courts, so as to protect workmen employed in hazardous occupatons.

IN ARIZONA HERCULES COPPER CO. V. CRENSHAW, ADMR., 21 Ariz. 15-20; 184 Pac. 996, the Supreme Court of Arizona, speaking through Baker, J., uses this language:

> "The new concept is that the master must answer, regardless of his (master's) fault. This new and different scheme and basis of indemnity for industrial accidents should be remedially applied by the courts, with a view

> of bringing within the benefical operation of the law all workers whose accidental injuries are the result of inherent occupational risks and hazards, rather than with the view of excluding from the operation and protection of the law workers who justly and fairly fall within its provisions. Arizona Copper Co. v. Hammer, 250 U. S. 400, 63 L. Ed. 1058, 39 Sup. Ct. Rep. 553; In re Rheinwald, 168 App. Div. 425, 153 N. Y. Supp. 598."

IN VOGT. V. SOUTHERN COAL, COKE & MINING CO., supra, (210 Ill. App. 620), plaintiff was employed as "top man" or machinist's helper at the Company's mine. He was sent to the engine house by the top boss and directed with others to split a circular disc. In performing this task he was injured. The statute of Illinois under which the action was brought named the following enterprises as being hazardous; "* * * mining, surface mining or quarrying."

We quote the followng excerpts from the opinion in said case, (p. 626):

> "In determining whether or not a person has received an injury arising out of and in the course of his employment, the Supreme Court has not adopted a strict construction of the Compensaton Act but has held that if the occupation in which the injured person was engaged could reasonably be referable to the principal work engaged in by the employer that construction should be adopted, and if the employer was engaged in an extra-hazardous employment, as contemplated by the statute as above set forth, the injured

person should be held to be within the provisions of the statute and the defenses of assumed risk, contributory negligence and fellow-servant would not be available to the employer. Armour & Co. v. Industrial Board of Illinois, 273 Ill. 590; Parker-Washngton Co. v. Industrial Board of Illnois, 274 Ill. 498; Gibson v. Industrial Board of Illinois, 276 Ill. 73."

(p. 628) "* * * * we are of the opinion that appellee was at the time of receiving his injury engaged in the extrahazardous employment of mining as contemplated by the statute. The hoisting engine being repaired was an engine used for lifting the coal at appellant's mine, and the evidence tended to show that the mining operations at that point were tied up by reason of the break in this disc and that appellee at the very time of receiving his injury was employed in the business of repairing said engine in order that said mining operations could be resumed. His injuries occurred in the course of and grew out of his employment in and about the mining business conducted by appellant, and the defenses of contributory negligence, assumed risk and fellow-servant were therefore not available to appellant."

DEFENDANT'S AUTHORITIES

(Brief pp. 21-25)

ARIZONA EASTERN R. R. CO. V. MATTHEWS, 20 Ariz. 282; 180 Pac. 159. Matthews was a local bill clerk for a railroad company and was not engaged in "manual or mechanical labor." In returning from a restaurant to the freight depot, he fell into a pit and was injured. The Court said:

"So we conclude appellee (Matthews) was not, at the time of the accident engaged in manual or mechanical labor, and therefore is not entitled to the benefits of the Employer's Liability Act."

CONROY V. CITY OF CLINTON, 33 N. E. 525 (Mass.), was a negligence case and is not even remotely in point.

In EDELWEISS V. COM. 125 N. E. 260 (Ill.). two employees in a restaurant got into a sudden altercation whereby one was struck on the skull and killed. There was no proof to show that the altercation between them grew out of the manner of performing their work or had any connection with it.

The Court observed: "It is not sufficient that an accidental injury occur in the course of the employment, but it must arise out of the employment." The case in no way sustains defendant's contentions.

WENDT V. INDUSTRIAL COM., 141 Pac. 31 (Wash.). In this case, Clara Wendt, respondent, appealed from a decision of the Commission holding that she was not entitled to compensation upon the accidental death of her husband, the Commission holding that the deceased was not engaged in a hazardous employment, within the meaning of the law, at the time of receiving the injury causing his death. The lower court overruled the finding of the Commission, and directed that the claim be

allowed, from whch decree the Commission appealed to the Supreme Court of the State of Washington, where the judgment of the lower court allowing the claim, was affirmed by an unanimous opinion. We quote the following illuminating excerpt from the opinion in said case:

> "If the employer conducts any department of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of the act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. Such interpretation we believe falls within the letter as well as the spirit of an act that, because of its humaneness and declaration of a new public policy should be interpreted liberally and broadly in harmony with its purpose to protect injured workmen and their dependents independent of any question of fault."

Why counsel have cited the Wendt case as sustaining any of their contentions is a mystery to us.

GUERRIERI V. INDUSTRIAL COM., 146 Pac. 608 (Wash.). The plaintiff was injured while operating a passenger and freight elevator in a mercantile establishment. The Court held that such work was not a hazardous employment for the reason that under the Washington statutes, the classification applied to the operation of "Grain Elevators" and not to passenger or freight elevators.

STATE V. BUSINESS PROPERTY CO., 152 Pac. 334 (Wash.). This case defeats defendant's

contention in toto, and reverses the judgment of the lower court which held that the respondent was not liable. In holding the respondent liable the Supreme Court of Washington said:

> "The respondent's liability is not to be determined by an answer to the question whether it is **principally** engaged in an extrahazardous business, or in conducting extrahazardous works, but if it 'conducts any department of (its) business, whether large or small, as an extrahazardous business within the meaning and defined terms of this act, (its) workmen would come within the class designated by the act. * * * " Wendt v. Industrial Commission, supra."

REMSNIDER V. UNION SAVINGS & TRUST CO., 154 Pac. 135 (Wash.). This was a negligence action instituted by plaintiff for personal injuries received while employed by defendant as its janitor. The jury returned a verdict in favor of plaintiff for $5,000.00 upon which judgment was entered. From the judgment the defendant company appealed claiming that plaintiff was a "workman" engaged in "extrahazardous" work within the meaning of the Workmen's Compensation Act of Washington, and that therefore the Court had no jurisdiction of the action. The Supreme Court decided against this contention and said:

> "But neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extrahazardous, nor has any

rate of contribution been fixed as provided in the clause quoted.

> "In the recent case of Guerrieri v. Industrial Insurance Commission, 84 Wash. 266, 146 Pac. 608, after another careful analysis of the statute, we held that one who was employed in operating a passenger or freight elevator or lift in a mercantile establishment was not engaged in an extrahazardous employment within the meaning of the statute. That decision by plain inference is contrary to the appellant's contention here. Respondent was not engaged in an extrahazardous work within the meaning of the act."

WILSON V. DORFLINGER & SONS, 218 N. Y. 85 (112 N. E. 567), cited by defendant, is not in point. The firm for whom deceased was employed was "engaged in the business of selling glassware," a non-hazardous enterprise. While operating an elevator on the firm's premises, the deceased fell down the elevator shaft and was killed. The Workmen's Compensation Law only applied to the "operation of **grain** elevators," and hence did not embrace ordinary **passenger** elevators. The firm's business of "selling glassware" was not a business or occupation mentioned in any of the groups enumerated in the Workmen's Compensation Law. It follows that the accident did not and could not come under the Workmen's Compensation Law.

NEW CORNELIA COP. CO. V. ESPINOSA, 268 Fed. 742, (Circuit Court of Appeals, Ninth Circuit) (Brief pp. 19-20). Deceased, in going to his

work in the mines of the company, near Ajo, Pima county, Arizona, built a fire on the surface about 30 or 40 feet from the entrance to the mine for the purpose of warming himself. The fire was started about 15 minutes before the time deceased was required to descend to his work in the mine. An explosion of powder in the wood killed him. His administrator brought suit under the "Employer's Liability Law of Arizona," and recovered judgment. The judgment was reversed for the following reasons, tersely stated by Mr. Justice Morrow as follows:

> "* * * but the deceased was not at work in the mine at the time of the explosion causing his death, and he was not in dangerous proximity to the explosive being used in the mine. He was on the surface, where no mining operations were being carried on by the defendant, and where it was not using explosives. The deceased was employed by the defendant to work in the mine, and not on the surface. The hazardous occupation in which the deceased was engaged was in the mine, and not on the surface. The building of a fire on the surface was no part of defendant's mining operations. It was the deceased's voluntary act, at a point 10 or 15 feet to the side of the road, and before he had gone to work, and against the general instructions of the mine foreman.. The powder or dynamite was not placed under the wood by the defendant, or by its direction or consent. It was concealed under the wood, and the inference is that, if it was obtained from the defendant, it was taken without authority and was a tortious act.

> "The risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in the doing of that work the risk or hazard was avoidable by the deceased. It was an outside venture, unattached to the hazardous employment in which he was engaged when at work in the mine. He need not have gone there; he need not have started the fire. The work for which deceased was employed did not necessitate his presence near the fire on the surface, or near the explosive that was there, or at that place at all. It did not necessitate his dangerous proximity to gunpowder or dynamite at or near the place of the accident."

On re-hearing, in the Espinosa case, the rule laid down in the Matthews case, supra (20 Ariz. 282; 180 Pac. 159) was discussed.

DEFENDANT'S ASSIGNMENT OF ERROR NO. V.

(D) Defendant's Assignment of Error No. V., relating to the testimony concerning Liability Insurance. (Tr. p. 101, Brief pp. 25-36).

This testimony was not elicited by any question propounded by plaintiff's attorneys. The trial court permitted plaintiff to relate some details concerning his injuries and plaintiff made the statement that Mr. Thompson informed him that the Company had the men insured, the language used being: "They have them all insured and just as soon as ever those pictures are developed, I will go down

and try to settle up with you. I don't want you to think" (objection) (Tr. p. 40). The statement was casually made in a lengthy recital of details, in which the subject of insurance was brought up by Mr. Thompson.

The trial court subsequently struck out all the testimony of the witness regarding liability insurance and instructed the jury then and there as follows: "* * therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement." (Tr. p. 50).

Defendant filed no assignment of error asserting that the verdict of the jury was excessive, or that it was arrived at through passion or prejudice, or that this casual statement of liability insurance affected the verdict in any way, shape or form.

DEFENDANT'S AUTHORITIES

Re: Liability Insurance Statement.

(Brief pp. 33-36)

SIMPSON V. FOUNDATION CO., 201 N. Y., 479; 95 N. E. 10. The judgment in this case was reversed but not on the grounds suggested by counsel. It was reversed on other grounds. (95 N. E. p. 13). Furthermore, the objections to testimony regarding liability insurance were improperly overruled by the trial court, and allowed to stand. In other words improper testimony was not stricken out.

IVERSON V. McDONNELL, 78 Pac. 202 (Wash.). Counsel for the plaintiff on cross-examination repeatedly asked defendant if he did not carry insurance on his men. The trial court overruled objections to such questions and compelled the defendant to answer. The appellate court very properly reversed the judgment. Plaintiff's counsel was guilty of reprehensible conduct, and the trial judge failed in his duty in compelling the defendant to answer the improper questions.

LOWSETT V. SEATTLE LUMBER CO., 80 Pac. 431 (Wash.). The conduct of plaintiff's attorney in this case was even more flagrant than in the Iverson case, and the trial court permitted the prejudicial questions. The judgment was and should have been reversed.

STRATTON V. NICHOLS, 81 Pac 831 (Wash.). In this case the conduct of plaintiff's attorney in injecting into the examination of jurors and witnesses statements indicating that defendant was insured in a casualty company was held such misconduct as to require a reversal.

BIRCH V. ABERCROMBIE, 133 Pac. 1020 (Wash.). Judgment properly reversed in this case for reprehensible conduct of attorney for plaintiff in pressing inquiry as to casualty insurance, even after the Court ruled that such testimony was incompetent.

SHAY V. HORR, 139 Pac. 604 (Wash.). Jud

ment properly reversed for exceedingly reprehensible conduct of plaintiff's attorney in referring to liability insurance in his opening statement to the jury, and in interrogating witnesses concerning the same, after repeated objections by opposing counsel.

CAMERON V. PACIFIC LIME & ETC. CO., 144 Pac. 446 (Wash.). Judgment properly reversed for improper conduct on the part of plaintiff's counsel in intentionally pursuing a witness on re-cross examination until he obtained an answer disclosing that defendant carried liability insurance covering the accident involved.

DAMERON V. ANSBORO, 178 Pac. 874 (Wash.). An examination of this case fails to disclose that any issue directly or indirectly concerning liability insurance was involved.

UNION PACIFIC R. CO. V. FIELD, 137 Fed. 14, 18. No question of liability insurance was involved in this case. The judgment was reversed on account of the admission of unsworn statements of irrelevant facts by counsel for plaintiff in his address to the jury.

WALDRON V. WALDRON, 156 U. S. 361; 39 L. Ed. 452. Suit for alienation of affections. Liability insurance not involved. A new trial was granted for improper conduct of plaintiff's counsel in addressing the jury. The opinion was written by Chief Justice White, who observed:

"Thus, the case, in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible, and to cause the harmful consequences arising therefrom to permeate the whole record, and render the verdict erroneous. Our conviction in this regard is fortified by the fact that although the unauthorized us of the evidence occurred in the final argument of the counsel for plaintiff who first addressed the jury, and was then and there objected to and exception reserved, the same line of argument, in an aggravated form, was resorted to by the counsel who followed in closing the case. Indeed, the language of this counsel invited the jury to disregard the finding of the court, by looking beneath the facts which were lawfully in evidence."

PROPOSITION IV.

An Appellate will not reverse a judgment and grant a new trial where it appears that the losing party was not prejudiced by the alleged errors complained of.

Tanner, et. al. v. Harper, 32 Colo. 156; 75 Pac. 404

Holman v. Rayensford, et. al., 3 Kan App. 676; 44 Pac. 910.

Petajaniemi, et. ux. v. Washington Water Power Co., 124 Pac. 783 (Idaho).

Louisville Etc. Co. v. Sullivan Etc. Co., 27 So. 760 (Ala.)

Vandalia Coal Co. v. Price, 97 N. E. 429 (Ind.).

O'Neil Mfg. Co. v. Pruitt, 36 S. E. 59. (Ga.) 110 Ga. 577.

We quote a few excerpts from some of the above cases:

TANNER, ET. AL., V. HARPER, supra, (32 Colo. 156; 75 Pac. 404), was a personal injury case growing out of an accident in a mine. Plaintiff was awarded $5,500.00 damages by the jury's verdict. On appeal, error was predicated upon statements of attorney for plaintiff to the jury directly charging that an **insurance company was the real party in interest.** The Supreme Court of Colorado in affirming the judgment of the trial court said:

> "When the jury were being impaneled, one of the counsel for plaintiff stated that an insurance company was the real party in interest in defense of the suit. Counsel for defendants advised the jury that they should disregard the remark of counsel. On the examination of the jurors on their voir dire counsel for plaintiff, over the objection of defendants, were permitted to ask each juror whether he was acquainted with the insurance company in question, and whether he had been in its employ. If the statement complained of was erroneous, and was not cured by the ruling of the court, or if the questions to the jurors were improper, they are not sufficient to work a reversal if it affirmatively appears that the defendants were not prejudiced thereby. The great weight of the testimony on the question of the negligence of defendants in constructing the track, and also on the subject of the alleged contributory negligence of the plaintiff, was overwhelmingly in favor of the latter. He was very seriously injured. The ex-

> tent of his injuries was such that the amount awarded by the verdict returned is not at all unreasonable. So it appears from the record that there was no close questions of fact in the determination of which the jury might have been unconsciously influenced by the consideration of extraneous and improper matter. We conclude, therefore, that it affirmatively appears that defendants were not prejudiced by the alleged errors, and hence cannot complain of their commissions. Manigold v. Black River Traction Co. (Sup.) 80 N. Y. Supp. 861.
>
> The judgment of the district court is affirmed."

Like the Tanner case, supra, the case at bar is not encumbered by any close questions of fact. It is all one-sided,—in favor of plaintiff.

In PETAJANIEMI, ET. UX., V. WASHINGTON WATER POWER CO., supra, (124 Pac. 783 (Idaho)), the Supreme Court of Idaho said:

> "Another question has been urged here, and that is the remarks and argument of counsel for respondents, as made in the trial court. The record, containing different remarks and argument made by counsel in the course of the trial to which appellant has excepted, is too voluminous to insert in an opinion. We have examined it with care, and must say that it was of such a nature as could not well be approved by any court, and was calculated to prejudice the jury, rather than to furnish them any aid in the way of fact or argument upon which to base a verdict. If there was any doubt as to the justice of the verdict in this case, the court would

be justified in reversing the judgment on account of the prejudicial statements and arguments made by counsel for respondents (Gladstone v Rustemeyer, 123 Pac. 635); but, after an examination of the whole record, we are fully satisfied that the verdict in this case is eminently just, and that the respondents have not obtained any larger verdict than they were entitled to recover.

"We conclude that the judgment in this case ought to be affirmed; and it is so ordered."

PROPOSITION V.

An Appellate court will not disturb a verdict for damages unless upon the whole case it affirmatively appears that the award was the result of passion or prejudice on the part of the jury.

On this proposition we believe the authorities are practically unanimous. We cite the late Arizona case of INSPIRATION CONSOL. COP. C. V. LINDLEY, 177 Pac. 24, 20 Ariz. 95, wherein it was held:

"We can only disturb a verdict for excessive damages when it appears that the damages are so excessive that the award cannot be sustained on any other theory than that it was the result of passion or prejudice on the part of the jury. It was for the jury to exercise an intelligent discretion in the award of damages, and there is nothing in the amount awarded to indicate that the verdict was the result of other than the exercise of a sound discretion.

> "For the foregoing reasons, the judgment of the lower court is affirmed."

In CRANE V. FRANKLIN, 17 Ariz. 476; 154 Pac. 1046 (On rehearing) Ross, C. J., said:

> "The plaintiff sued for $1,402. Evidence of his damages ranged from that amount down to $600. The verdict of $540, it would seem to us, is supported by the evidence. We have many times decided that where substantial evidence supports the verdict of the jury, this court will not disturb it.
>
> "Judgment of the lower court is affirmed."

In the case at bar, plaintiff sued for general damages in the sum of $10,000.00, and for special damages for loss of time. The special damages proved amounted to $700.00. The jury awarded him $8000.00 which, considering the very severe injuries sustained was not excessive. Had the jury been prompted by bias or prejudice it might have awarded a much larger amount.

DEFENDANT'S SPECIFICATION OF ERROR VI.

Under Argument No. IV. p. 37 of its Brief, Specification of Error No. IV., defendant complains of error in the denial of physical examination of the plaintiff. The defendant admits that the Trial Court had no power to order an examination of the plaintiff, there being no statute in existence in Arizona authorizing such examination. The defendant, how-

ever, takes the position that because plaintiff offered the jury the inspection of an injury to his head that the Court thereby was vested with authority and discretion to order a general examination. It will be observed that the right of defendant to examine plaintiff's head, through experts or otherwise, was not questioned and was in fact granted. The defendant does not complain of a denial of an examination of plaintiff's head but only of denial of a general physical examination.

The law seems to be fairly well settled that where plaintiff offers an injured member in evidence, the defendant has a right to examine such member. The cases cited by defendant on pages 38 and 39 of its Brief are all cases on this point.

In the KENDALL case, the question involved was the error of the Court in refusing to compel plaintiff to submit his knee for examination after he himself had shown his injured knee to the jury.

The ROBERTS case, cited by defendant, is not in point, the rule in that jurisdiction being that the Trial Court had a right to order a physical examination.

In the HOLTON V. JANES case cited by defendant, an injury to plaintiff's head was shown to the jury; the defendant asked for permission to examine plaintiff's head and this right was denied by the Court. No general physical examination was demanded and that question was not involved. A

review of the authorities fails to disclose a single decision where it has been held directly or indirectly that the exhibition of an injured member to the jury authorized the Court to order a general physical examination.

The rule is otherwise settled in

Wheeler v. Chicago and W. I. R. Co., 267 Ill. 306; 108 N. E. 330-339,

where plaintiff exhibited an injured leg to the jury. The Court said:

> "We do not think that the mere showing of the injured member to the jury gave the defendants the right to invade the privacy of plaintiff's person and make him submit to an extended scientific examination of the same in the presence of the jury."

The Specification of Error is without merit. The discretion of the Court extended only to the extent of allowing an examination of plaintiff's head which was in fact done. (Tr. pp. 57-59).

DEFENDANT'S ASSIGNMENT OF ERROR NO. X.

(p. 102 Tr.), presented in Defendant's Brief (p. 40) in Argument 5, as Specification of Error VI.—Admission of Mortality Tables.

Error is alleged by defendant on the Admission of the Mortality Tables on the ground that there was no evidence of permanent injury. No contention is raised as to the Court's instructions cover-

ing the use by the jury of these tables. (See Assignment X., p. 102 Tr.)

The Assignment is untenable. The question has been decided adversely to defendant in the late opinion of this Court in the case of **United Verde Extension Mining Company v. Koso, 273 Fed. 369;** decided May 2, 1921; re-hearing denied June 6, 1921.

The rule is settled that where there is any evidence tending to show injuries of a permanent character Mortality Tables are admissible. United Verde Extension Mining Company v. Koso, Id.

See 19 R. C. L., p. 218, paragraph 5, Title "Mortality Tables," where it is said:

> "The tables are admissible where there is some evidence tending to show that the injuries received were of a permanent character or even where the evidence is conflicting as to whether the injury received was of such a character." See note in 40 L. R. A. 557.

The question of permanent injury was for the jury and was left to them by appropriate instructions. (pp. 87-88 Tr.)

Defendant's claim that there was no legal substantial evidence of permanent injury is wholly without foundation. The record discloses that plaintiff suffered a fall into a ten-foot concrete pit. A fifty-pound iron roll fell upon him. He was rendered unconscious, his forehead fractured; a de-

pression made in the bones of the back of his head. (Pages 36-37 Tr., and see Supplemental Statement of Facts, this Brief.) Of the effects of this injury, plaintiff testified: " * * * the back of neck and of my head is sore. There is a lump on my skull and my nerves is gone. My head aches and my neck hurts ever since. I never had a headache or backache or bad nerves before." (Page 37 Tr.)

"I suffer with the back of my head and neck, have had headache every day, cannot turn my neck around any further than (indicating) or back; * * * I never had a headache or backache before. * * * I wasn't able to get out and hunt a job. There was no light work I could get around there. I wasn't able to pitch hay and wouldn't undertake it. I could not do clerical work. * * * I am nervous, my hands and legs tremble, which I never did before." (pp. 42-43 Tr.)

Dr. J. B. McNally, for plaintiff (pp. 44-47 Tr.) testified in substance that in September, about four months after the injury he examined plaintiff, found an ulcerated injury to his forehead, a depression on the left side of his head in the posterior region, and noticed a fine or muscular tremor all over his body. His neck muscles were apparently very tender, slightly rigid where attached to the bone. "I concluded there was probably a concussion of the brain or some part thereof that may have set up the tremor. I examined him again within the last week. * * * His nervous condition was very

slightly exaggerated, I think. * * * Well, I believe the cells of the brain were disarranged and their physiological function was disturbed.

"Defendant's Attorney: And that, you say, will continue or won't it clear up?

Witness: I think it will continue in a man of his age."

Harry Garrison, for plaintiff, (pp 51-52 Tr.), testified: "He (referring to plaintiff) is apparently a changed man from what he was before, physically and mentally. He has been round my shop when I was working and when I asked him to hand me a tool, he would miss it and grab around before he got it, shaking all the time. * * * During the three years I knew Littlejohn previous to this accident, he was apparently healthy. * * * His nervousness and shaking before the injury were not noticeable."

Sarah Littlejohn, for plaintiff (pp. 52-54 Tr.) testified: "He (referring to plaintiff) has not been working since his injury. I have observed a nervous condition; he is restless at night, gets up and walks the floor and puts his hand to his head. His hand shakes; he cannot get his coffee to his mouth without shaking. * * * Before this injury * * * he was generally a hard working man; never sick or nervous or sleepless and worked continuously."

Defendant, through its experts, did not attempt to deny the permanency of plaintiff's physical condition nor the skull injuries which he and Dr. Mc-

Nally testified to. X-Ray plates of plaintiff's skull. which defendant's doctors had taken, were not put in evidence, neither did they testify except on cross-examination concerning their examination of Mr. Littlejohn which they made during the trial.

Dr. Thigpen, for defendant (pp. 65-69 Tr.) stated that some time after the injury, he made an examination of Mr. Littlejohn and found a subject who, in his opinion, was a case of premature senility, who had a recent injury. On cross-examination, the doctor admitted that he had not found any chronic trouble which might have brought on this so-called premature senile condition and that shock and other causes might tend to produce the condition of senility.

Dr. H. T. Southworth, for the defendant, (pp. 69-73 Tr.) gave it as his opinion that Mr. Littlejohn was suffering from premature senility, and that his present nervous condition was not solely attributable to the injury. On cross-examination, he was unable to give any reason for this condition except that the plaintiff had been at hard work during his lifetime. On direct examination, Dr. Southworth stated that Mr. Littlejohn's condition could not be relieved by medical treatment. He admitted on cross-examination that plaintiff had a pulse of 128 to 134 when his normal pulse should have been 80 to 90.

From the above excerpts from the evidence, it will be seen that Mr. Littlejohn's condition, as

testified to at the trial was admittedly of a permanent character. Plaintiff and his doctor testified that his physical condition was a result of the injury and all of plaintiff's evidence tended to establish this. The defendant merely sought to show that plaintiff's condition resulted from other causes than his injuries. This was a question for the jury, wholly and entirely.

AUTHORITIES CITED BY DEFENDANT

Practically none of the authorities cited by defendant support its contention, and for the most part may be relied upon to support plaintiff's position.

The discussion of Mortality Tables in KERRIGAN V. PENN. is merely dicta. The ROONEY decision holds the introduction of life tables proper and that the question of permanent disability is for the jury. To the same effect is CITY OF FRIEND V. INGERSOLL, cited by defendant.

The decisions cited on page 43 of Defendant's Brief can be analyzed as follows: In the LEACH V. DETROIT case, plaintiff's own evidence showed the injury to be "trifling." In TENNEY V. RAPID CITY, the record disclosed no evidence tending to prove permanent injury. The Texas cases of TEXAS & N. M. RY. COMPANY, V. DOUGLAS, and CITY OF HONEYGROVE V. LAMASTER are not in point, for the reason that in that jurisdiction, there is a rule making Mor-

tality Tables inadmissible except in case of death or total disability.

The question of the introduction of Mortality Tables is not involved in the STEVENS V. N. J. R. R. case. Moreover, in that decision, it was conceded that plaintiff would, in all probability, recover from a paralytic attack resulting from the injury. Here it is admitted that there is no cure for plaintiff's condition.

The case of KLEIN V. PHELPS does not involve the admission of Mortality Tables. The decision simply holds that where plaintiff suffered an injury to his head, etc., the result of which was to render him nervous and weak, and a physician stated he might never recover from his injuries, that the verdict for him would not be disturbed.

DEFENDANT'S ARGUMENT VI.

(Brief p. 45.)

We have covered the points raised in Defendant's Argument VI. under Propositions II. and III. aforesaid.

In passing, we desire to call this Honorable Court's attention to the remarkable statement made by defendant's counsel on page 47 of its brief to the effect that plaintiff did not exercise reasonable care or caution in going upon the staging over the concrete pit to install the heavy bolt which he was carrying. The uncontradicted evidence in the case shows that plaintiff was directed

personally by defendant's foreman to do exactly what he did, that is to say, take up a large bolt, carry it out on the planks and install it as directed. Plaintiff did not select the planks or even place them over this open concrete pit, but did exactly what he was told to do by defendant' foreman, and had a right to rely on the defendant performing its duty in providing a safe staging for plaintiff to walk upon with said bolt in order to install the same. However, all questions relating to plaintiff's negligence or lack of negligence were settled by the jury's verdict.

DEFENDANT'S ASSIGNMENT OF ERROR NO. XII.

(p. 103 Tr.), Presented in Defendant's Brief page 52, in Argument 7, as Specification of Error VIII.

ARGUMENT ON VAULE OF DOLLAR

This Specification of Error is wholly without merit and unsupported by any reason or authority. The rule is well settled that counsel in a personal injury case, may in his argument to the jury state what is common knowledge, that two dollars now is only equal in purchasing value to what one dollar was five or ten years ago.

Washington & R. R. Co., v. La Fourcade, (1919) 48 App. D. C. 364;

This case is practically on all fours with the case at bar. Counsel for the plaintiff, in speaking to the

jury, stated "That $10,000.00 now is only equal to $5,000.00 five years ago." The Court not only held the argument to be proper, but stated that it was competent for the jury to take into consideration the present value of the dollar, as such matter was within the knowledge and experience of men in general.

In the case of HURST V. C. B. & Q. (Mo. 1920), 219 S. W. 566; 10 A. L. R. 174, it was held that the courts would take judicial notice "That money today has much less purchasing power than it had twenty or even ten years ago."

Numerous cases to the effect that courts and juries may take into consideration the purchasing power of money are cited in 10 A. L. R., Note, p. 179, and in 3 A. L. R., p. 610.

The Specification of Error is frivolous. Counsel for plaintiff did not state as a fact that $10,000.00 is not worth as much as $5,000.00 a few years ago, but merely called the jurors' attention to that fact The argument was proper and is upheld by every authority where the question has arisen.

DEFENDANT'S ASSIGNMENT OF ERROR XV AND XVI.

(Pages 104-105 Tr.)

INSTRUCTIONS ON PERMANENT INJURY

Presented in Argument 8, page 54, Defendant's Brief, as Specifcations of Error XI and XII.

In replying to defendant's argument in support of the above assignments, plaintiff will not again review the evidence, but merely refer to the facts disclosing permanent injury presented under reply to Defendant's Argument 5 re admission of Mortality Tables, p. 46, et. seq. this Brief.

The uncontradicted evidence disclosed a permaninjury. There was direct testimony that plaintiff would not recover. Moreover, the character of the injuries received by plaintiff were such as to indicate that he would never recover. No other inference could be drawn from the evidence. Plaintiff's physical condition at the time of the trial, six months after the injury was grave. He was broken down, his nerves gone; he was unable to work, suffered constantly with headaches. His whole body was shaken by a nervous tremor. This condition was shown to be a result of the injury. The permanency of plaintiff's physical condition was not put in issue by the defendant. It was admitted as incurable. Defendant's only attempt was to avoid liability on the ground that this condition was the result of other causes. This was a question for the jury and was decided adversely to defendant. The Court's instructions were eminently proper and fairly presented the question of permanent injury to the jury. The trial court, out of an abundance of caution, stated: (p. 89 Tr.) "* * * Future damages can only be awarded in a case when the evidence shows it to be a reasonable certainty."

The law is settled in personal injury cases to the effect that it is ordinarily a question of fact for the jury to decide as to the nature and extent of the injury. Volume 8, R. C. L., p. 656, Par. 198, Title "Damages."

> "In personal injury actions, it is ordinarily a question of fact for the jury as to whether the plaintiff was injured, and the jury should decide also as to the nature and extent of the injury."

Where there is a conflict of evidence, the question of the permanency of injury is for the jury.

Remsnider v. Union Savings & Trust Co., (Wash. 1916) 154 Pac. 135, 137.

The instructions leaving it with the jury to assess damages for permanent injuries is proper, though there is no direct evidence that the injury is permanent, where there is evidence from which the jury might conclude that the injuries were of a permanent character.

Louisville & N. R. Co. v. Williams, 51 N. E. 128; 20 Ind. App. 576.

The Court's attention is directed to the following cases where instructions similar to those given by the trial court were approved under facts substantially the same as those at bar.

Chicago & E. I. R. Co. v. Filler, 62 N. E. 919; 195 Ill. 9.

Cicero & P. St. Ry. Co. v. Brown, 89 Ill. App. 318. Aff. 61 N. E. 1093; 193 Ill. 274.

Fishburn v. Burlington & N. W. Ry. Co., 103 N. W. 481; 127 Iowa, 483.

Ballard v. Kansas City, 86 S. W. 479; 110 Mo. App. 391.

Kenyon v. City of Mondovi, 73 N. W. 314; 98 Wis. 50.

The decisions cited in Defendant's Brief, pages 55-56, have no application to the facts in the case at bar.

In the WHITE case, there was a special finding by jury to effect that injury may be permanent.

The MEETER case is not reported in 75 N. Y. S.

The injury in the FILER case consisted of an inflammation to plaintiff's muscle which appeared to be in good condition at time of trial, the only evidence being that there was a possibility of its recurrence.

In the TWEEDY case, the plaintiff's testimony tended to show only temporary injury, while defendant's witnesses testified that the plaintiff was perfectly normal.

In the MORRIS case, it was admitted that the operation complained of had cured plaintiff. She was allowed damages for the loss of the organ removed, but naturally not for permanent injury since the operation had cured her trouble.

In the SNYDER decision, the injury consisted of a bruise to the back and there was no evidence of permanent injury.

The POLLOCK case appears to be a divorce action and has no application.

The STROHM decision passed upon the admissibility of speculative evidence by experts as to what might happen.

In the EASTHAM case, it was admitted that plaintiff would recover full use of his arm within a year.

It appears from the facts in the GIFFORD decision that the plaintiff was normal and fully recovered at the time of trial. The doctors' testimony merely dealt in possibilities as to what might result from the injury.

The holding in the McNEILL case is simply to the effect that mere proof of injury which in and of itself is not essentially permanent is insufficient as proof of permanent injury.

Moreover, the question raised by defendant has been settled in UNITED VERDE EXTENSION MINING CO. V. KOSO, 273 Fed. 369, where similar instructions were approved by this Court.

> "We may say, however, that upon the question of damages the instructions show that the court told the jury explicitly that they should consider whether the injuries, if any, were permanent, to what extent, if any, plaintiff had suffered, whether he had been disabled or incapacitated to earn a living at all, the age of plaintiff, what his occupation and income were, and whether his

employment would have continued." (273 Fed. p. 373).

Defendant's specifications of error not being based on the record are of no avail and must be disregarded.

CONCLUSION

We are satisfied that a perusal of the evidence and record in this case will show that no prejudicial or reversible error appears. The Trial Court at all stages of the case properly safe-guarded the rights of defendant. His instructions to the jury embraced and comprehended every essential and material feature of the case.

Under the Employer's Liability Law of Arizona, plaintiff at the time of his injuries, was engaged in a hazardous occupation, and while so engaged in carrying out the direct orders of the defendant company, he was seriously and permanently injured. The jury awarded him damages. The errors complained of were presented fully to the trial court on defendant's motion for a new trial and a new trial denied. Substantial justice has been accomplished in this case and the judgment of the trial court should be affirmed.

Respectfully submitted.

Sullivan & Morgan

Attorneys for Defendant-in-Error.

NO. 3703

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
Plaintiff in Error.

vs.

JOHN T. LITTLEJOHN,
Defendant in Error.

Reply to Brief of Defendant in Error

UPON WRIT OF ERROR IN THE UNITED STATES DISTRICT COURT IN THE DISTRICT OF ARIZONA

FAVOUR & BAKER, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged this.....day of October, 1921.

.....
Attorneys for Defendant in Error.

the facts brought the accident within the Liability Law.

Counsel admits herein that plaintiff could work; counsel states he "could only perform light work" (p. 4) and there was "no such work available."

The quotation (p. 8) of Sec. 3147 cited by plaintiff shows legislative intention that employment must be "in or about the **operation** of smelters."

Any inference that the accident in this case was in an "open pit" as contemplated by the Statute in using that term is an incorrect and unwarranted interpretation, because the judge of the lower court understood the application and so explained (Tr. 80); also:

NOTE ON WORKMEN'S COMPENSATION:

What is a Mine within the meaning of the Acts; In 11 Amer. Law Reports 154:

> Generally with respect to the term "mine" it is stated in 18 R. C. L. 1092:
>
> A mine in its specific sense, is a work for the excavation of minerals by means of PITS, SHAFTS, etc., as opposed to a Quarry where the whole excavation is open * * *
>
> As originally used, the word "mine" was exclusively connected with underground workings, but both in this country and in England, in later times, the word has received an enlarged meaning, and under the

> modern construction it is not limited to mere subterranean excavations or workings, but includes, for example, beds of clay or limestone, reached by OPEN WORKINGS and workable only from OPEN CUTS.
>
> There are certain excavations which are termed neither mines nor quarries, as for instance places where clay is being dug out for bricks; such places are frequently called PITS, and also OPEN WORKS.

Plaintiff seeks to give to the clause "in and about" mines or smelters, a meaning which comprises work "in the outside vicinity of" mines or smelters, which would include all manual work on the surface of a mining claim, and include accordingly all manual work in the hotel or boarding house and other welfare agencies conducted by the employer on the mine or near the smelter, and all other manual work performed on the ground such as janitor work in an office building near the smelter or on the mine of an employer. There is no decided case based upon and upholding constructions of the Arizona Liability Law which even leans to such an interpretation. All the cases which have been decided favorably to plaintiffs upon appeals involving the question of Employers' Liability of Arizona have been causes where the plaintiffs were employed, in the true sense, "in and about" mines or smelters, that is, engaged in hazardous occupations in underground workings, in or about a mine, or engaged in hazardous works "in and

about" a **smelter** as that term is understood, and is interpreted in Calumet & Arizona v. Chambers, as well as in the reasoning of other decisions.

> In the **Chambers** case the Court states, at page 58: "The complaint shows that the defendant was engaged in operating a **smelter** and machinery incident thereto; that at the time of the accident * * * the plaintiff was in the service of the defendant engaged in performing his duties **about** the said smelter including the duty * * * in event of an emergency or accident to assist and aid in restoring conditions and putting things in working order.
>
> "The surroundings in which plaintiff was performing his duties are described in the complaint with sufficient fullness to show that the risks and hazards assumed by the employees are great and **inherent** in the occupation, and unavoidable by the workmen."
>
> At page 60: "The answer sets forth in detail the circumstances surrounding the place of the accident, the employment engaged in at the time and the apparatus necessarily used for the purpose * * *
>
> "That the floor is made almost entirely of sheet iron and in said floor are many openings, small and large, made necessary by the mechanical requirements of operation of appliances used in the **smelting processes** of defendant."

The Court's use of the word "about" clearly shows it does not mean "outside in the vicinity" or incidental work, but about the employment of smelting and smelting processes, and in the smelter.

Moreover, in the cases in which, on appeal, plaintiffs have been denied a recovery, the plaintiffs were held to be **outside** the mine when on the surface (Espinoza), at p. 751 "the deceased in the present case was not at work either in or about the mine at the time," and outside the hazardous part of the business of railroading when not subject to its inherent risks or conditions. In none of the cases has a plaintiff employed by a mine owner or a smelter owner been permitted to recover under the Employers' Liability Law of Arizona, for any accident in his occupation when that was not, as required by the Constitution and Sec 3154, R. S. A., a **"hazardous occupation in mining or in smelting,"** that is, work "in and about" a mine or a smelter and **inherently** hazardous as such. If the term "in and about" were given the unwarranted meaning "anywhere in the vicinity of" and work incidental to mines, machinery operation, etc., then Mathews would have been given a right of recovery, since the manual nature of work was not the controlling factor in the reasoning (see statement in the Espinoza case) and he was unquestionably engaged in work essential in railroading business, declared hazardous; and the above quotation from the Espinoza case would be erroneous and overruled. The case of Scullion v. Cadzow Coal Co. (51 Scot. Law 39) cited in Note, p. 154 in Vol. 11 Am. Law Reps., is another case where a laborer was at the pit head:

"An employee engaged as a surface laborer at the

pit head was not employed in any process of "mining" within the meaning of the English Workmen's Compensation Act.

"What then, is, in plain language, the meaning of the expression 'the process of mining?' I think there can be no doubt the meaning of that expression is the obtaining of mineral from an excavation in the earth which necessarily implies two things: (1) The actual cutting or hewing of the mineral. (2) Its removal to the surface. In no part of that operation was appellant engaged."

While the defendant's position is that its points would cover the case whether recovery was sought under either paragraph of Section 3156 R. S. A., attention is invited to the fact that on pages 10 and 11, counsel continues his alternative that the plaintiff was working either in a smelter (Sec. 3156 par. 8) **or** in mills, shops, etc. (Sec. 3156 par. 10), or a mixture, what is popularly termed a "straddle." If such an alternative or mixture were permissible in the pleading, the uncertainty was eliminated by the instructions of the judge which confine the jury to employments under par. 8 of Sec. 3156 (Tr. 77 and 78). The plaintiff did not except to the instructions, and he cannot be permitted to argue that par. 10 may be an alternative possibility when the Court's instruction took no account thereof, limited the jury to par. 8, and the question was never submitted to the jury.

Proposition II (page 11)

All cases under other laws, cited by plaintiff, are distinguishable for the reason the Arizona law is unique in **unrestricted liability** and consequent clauses restricting it to accidents **due to conditions of employment and inherent risks**; and the **various state laws have specific provisions upon which these decisions are based**; for example:

In the **Boody** case: There is no provision about being due to a condition of employment or inherent hazard of occupation; the New Hampshire act simply stated "to workmen engaged in manual and mechanical labor in the employment," and restricts liability.

Larsen Case (p. 15): The New York statute declared that there should be a "presumption that a claim under the Act came within the Act unless there was substantial evidence to the contrary," and the Court simply held there was no evidence to the contrary, plainly indicating there might have been and the decision might have been different.

O'Toole Case: This is clearly based upon statute which gave an "extended meaning" to the word "factory," and is therefore not in point.

Pellerin Case (p. 16), Federal: **Plaintiff's work was inside the mill, on machinery.** The paragraph preceding plaintiff's quotation throws a different light on the application of the decision: "Moving the cupboard, if it is to be considered by itself, without re-

> gard to any work included within the plaintiff's general employment, is certainly not shown to have been work 'in connection with or in proximity to * * * machinery.' It had no connection with any machinery whatever, nor can we believe it was 'in proximity to' any, in the statutory sense, **even if such machinery was to be found inside the building to which the platform belonged.** If plaintiff had been employed to do such work as never required him to enter this building belonging to the mill and containing machinery he would not have been entitled to the statutory remedy." The testimony shows Littlejohn in his work for the company was never required to enter any building where machinery was operating.

The Illinois and New York cases cited by plaintiff are likewise based upon entirely distinctive statutes **limiting the liability,** and **containing no provision that the cause must be due to a condition of the occupation** and inherent risks, and which make detailed definition of the hazardous occupations and cover broadly many employments not included in Arizona Law, for example:

> **Gibson** v. Industrial Board (p. 20): The case is not pertinent, because of the statutory provision; plaintiff was engaged in an occupation covered by the statute as "any enterprise in which explosive materials are manufactured, handled or used." There is cited, however, the case of Vaughan Seed store v. Simonini (Ill.) 114 N. E. 163, which positively and clearly states and establishes defendant's ground in the case at bar.

In that case the proprietor had a salesroom with freight elevator; a warehouse at another point, and a farm on which greenhouses were maintained. The law made "building or maintaining any structure" a hazardous occupation. Plaintiff, a laborer on the farm, argued that defendant was **maintaining** a greenhouse on the farm, and a hazardous business in the city, and came under the law.

The Court: "His employment was not different from that of the ordinary farm laborer. His injury arose out of that employment (kicked by horse), but had no connection with the business of maintaining and using a greenhouse. Assuming that maintaining and using a greenhouse * * * was engaging in a hazardous occupation **the Act does not apply to all business of the employer without reference to its connection with the particular extra hazardous business.**" "To give the Act any other interpretation would render it unconstitutional."

"The object of sec. 3 was the better protection of employees exposed to greater danger by reason of their employment in these extra-hazardous occupations, and it was not intended that employers engaged in such extra-hazardous occupations should for that reason be subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances." "Plaintiff was not exposed to any of the dangers arising from such extra-hazardous occupations." "Whether or not defendant as to any part of its business was subject to the provisions of the Act, it was not subject as far as plaintiff was concerned."

Fogarty Case (p. 22): The statute giving a "**presumption**" that an accident came under the Act in absence of evidence to contrary applied here, as well as the other statutory provisions different in toto from Arizona.

N. Y. Central v **White** (p. 23): This decision shows positively the position of the U. S. Supreme Court construing a clause which is identical in substance and meaning with the Arizona Section 3154; and makes conclusive the point of defendant that it is the occupation of the employee which determines, and not the principal business of the employer.

The Federal Employers' Liability Act (35 Stat. at L. 65; and 36 Stat. at L. 143; U. S. Comp. Stat. Supp. 1909, p. 1171) provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury **while he is employed by such carrier in such commerce** * * *

This is similar wording to that of the Arizona Law, Sec. 3154, providing that any employer in hazardous occupations in smelting, etc., shall be liable for injury "**of any employee in the service of such employer in such hazardous occupation.**"

The U. S. Supreme Court has decided that this means not only that the employers must be engaging in interstate commerce but that the employee was at the time also engaged in such commerce, and that work on construction of instrumentalities intended for use when completed in such interstate commerce

is not work so related to interstate transportation as to be a part of it.

Pederson v. Del L. & W. 57 L. Ed. at 1127 and 1128: Plaintiff was carrying bolts and rivets to a bridge which was to be repaired. "That defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which plaintiff was employed at the time of his injury."

"Of course we are not here concerned with the construction of tracks, bridges, (etc.), which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

Chg. B. & Q. v. Harrington, 60 L. Ed. 941 (Justice Hughes): Plaintiff was engaged in switching coal in Kansas City Terminal Yards. "So also, as the question is with respect to the employment of decedent at the time of the injury, it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls * * * Was the employee at time of injury engaged in interstate transport or in work so closely related to it as to be practically a part of it. Manifestly, there was no such close or direct relation * * *"

New York Central v. White, 61 L. Ed. 670 (Justice Pitney): "Plaintiff was on duty at the time, and at a place not outside of the limits prescribed for performance of his duties * * * was an accidental injury arising out of and in course of his employment."

"The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal act. The test is 'Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it' * * Decedent's work bore no direct relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in Pedersen v. D. L. & W."

Applying the principle of this reasoning and decision of the Supreme Court to the Arizona Law with the same wording, the employee must be shown to be engaged in a hazardous occupation at the time of the injury, where an employer is engaged in a business which comprises both hazardous and non-hazardous occupations. And further, work on construction of any instrumentality to be used in the hazardous business is not work in such business or hazardous occupation.

Bravis v. Chg. M. & St. P. CCA 8th, 217 Fed. 234: Plaintiff was engaged in construction of a bridge on a cut off being constructed to straighten a curve. Men rode to work on a hand car on the main line which was interstate and plaintiff was injured by falling from the car and being run over.

"The mere fact that it was the purpose and intention (to use in interstate commerce) at some future time did not make it an instrumentality . . .The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince. The building of such a cut-off is new construction for use in such commerce."

Those employed in the construction of roadbeds, rails * * * and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in such commerce and are not protected by that act.

ARIZONA CASES

Mendez Case: Counsel cuts off his quotation (p. 24) at the right place for the support of his point, but at the wrong place if the Court is to get the full and real extent of the "conditions;" these additional conditions are precisely what this defendant urges must be found present to give right of recovery under the law:

"that the accident causing the injury suffered arose from the **dangerous and hazardous nature** of the service required in the industry as such is ordinarily carried on, and in carrying on such service necessary risks and dangers **inherent therein** are present as a menace to the workman without knowledge of which and without incurring the dan-

ger of injury therefrom he cannot perform such required service."

Mendez was working underground in and about the mine.

The following quoted in the **Mathews** case from New York decisions, shows clearly that the Supreme Court of Arizona does not consider the "principal business" of the employer has any application to the Arizona Law, and that an employee of a proprietor of a so-called hazardous industry may be at times in a hazardous occupation and at other times not:

"Where * * * the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute, even though he at times did work embraced within the statute."

Proposition III (p. 26)

This proposition concerning work fairly incidental is not applicable to this case. **If it applied as plaintiff contends then the Mathews case itself is wrong** because there (at page 287) it is admitted that the **employee was engaged in work essen-**

tial in the railroad business of his employer; as also would be the above quoted statement from the New Cornelia decision of this Court, and the decisions of the U. S. Supreme Court above cited, especially the Harrington case, construing the Federal Employers' Liability Act to apply only in cases where the employee proves himself to be in an occupation in interstate commerce, the fact that the employer is so engaged not being the controlling feature. There is no question here of a "bar" to other action, the plaintiff had the common law remedy which, as modified by Arizona law, has been said to be as favorable to the employee as are the Employers' Liability laws in many states.

Vogt Case (p. 29): The law of Illinois specified **surface** mining. Plaintiff was employed on a hoisting engine used to lift coal from the mine.

Conroy Case (p 31): This was cited by defendant to show the distinction between means completed and those in process of construction. It is supported by Federal Supreme Court cases herein reviewed.

Wendt Case (p. 31): Plaintiff misinterprets this. The principal business was non-hazardous; a portion of business was hazardous and accident occurred there, and the employer tried to evade on ground his principal business was non-hazardous.

On Defendant's Assignment of Error V. (p. 37)

No assignment of error is available on the ques-

tion of excessive verdict in this Court. This point was raised in motion for new trial.

Reply in Regard to Defendant's Cases on the Matter of Insurance

Iverson Case (p. 38): Counsel misreads when he states "the trial court overruled objections to such questions." At page 204, "It is true the learned trial court properly struck out the answer and instructed the jury not to consider it."

Stratton Case (p. 38): This is misread by plaintiff; objections were sustained in lower court; at page 83, the Court: "in face of the fact that in nearly every instance the objections were sustained."

Dameron Case (p. 39): Counsel states they found nothing re insurance; the statement is found at page 878 (6).

Proposition V. (p. 43).

Excessive damage is not a question for consideration by this Court, under its rulings.

Proposition VI. (p. 44).

Counsel states defendant asked for a "general physical examination." Defendant's request was (page 58 Tr.) "We desire to examine the plaintiff in so far as the condition of his head may make it necessary in order to show what the result of that alleged injury was."

The Wheeler case (p. 46) shows that plaintiff

agreed to an examination, but defendant insisted on particular physicians. There was no such condition in the case at bar; defendant asked for physician to be appointed by the Court.

On Defendant's Assignment X. (p. 46)

The citation of the Koso case is not in point, as a wholly new state of facts is presented in this case. Plaintiff begs the question by assuming the existence of evidence; that is the point raised, that there is no evidence, and only speculation and guess, as to the continuance in future of the alleged condition due to the accident; is the jury to judge the sufficiency of evidence.

The testimony quoted by counsel is applicable to temporary injury which any person might have for a long time after a fall or other accident. His Dr. McNally (p. 46 Tr.) said a concussion takes place when one is knocked senseless and is not always attended by serious results. "I don't think this injury caused any fracture of the inner table of the skull."

Garrison (a friend) states how Littlejohn acted when at work, whereas Garrison states he never saw him at work before the accident (Tr. 52).

The statement that the defendant did not attempt to deny permanence is true, because there was none to deny. But if intended to mean there was no evidence offered to show that injury was temporary

only, attention is invited to testimony of Dr. Moore (p. 63 Tr.); of Dr. Thigpen (p. 68 Tr.); of Dr. Southworth (p. 71 Tr.), and to testimony of Dr. McNally on cross-examination (p. 46 Tr.).

Defendant was refused the physical examination requested; how could it adduce further evidence?

Argument VI. (p. 52).

Counsel admits that plaintiff was directed to take a bolt over the **planks.** He intimates some negligence of defendant which was not brought out in evidence and could not be, under the decision in Cons. Ariz. v. Gonzales, 21 Ariz. 628. There is no evidence the staging was not safe; if there is any inference from the evidence it is that the men themselves made their own staging and it was a part of the work and duty of each to take reasonable precautions not to all step on the same plank. Further, if defendant was at fault, plaintiff's remedy was the common law and not Employers' Liability, where the cause must be "a condition of the employment." On authority of the Gardner case (21 Ariz. 206, p. 47 of Brief), and under instructions to the jury (Tr. 46), on the uncontradicted evidence we submit the plaintiff did not prove he was not negligent.

Even plaintiff's strongest authority says it is **ordinarily** a question of fact for jury on extent of injury. There was no conflict of evidence plaintiff states it was uncontradicted.

Replying to Plaintiff's Comments on Cases (p.56):

In re **Remsnider** Case: Two doctors stated positively there was permanent injury and two that there was not. This was held to be "conflict."

In **Meeter** Case (p. 55), the citation should be **18** N. Y. S. 561.

Tweedy Case (p. 57): Counsel says testimony in Tweedy case tended to show only temporary injury. One of the Tweedy's doctors said "there was a deposit about the spinal column and excessive soreness and the present condition will become permanent."

If counsel admits that such testimony, where claimant's own doctor stated that his condition would become permanent, tends to show only temporary injury, how can he claim that the evidence is uncontradicted showing permanency in his own case where there was not a word showing any condition would be permanent, but only Dr. McNally's statement "I cannot tell," referring to the tremor only.

Snyder Case (p. 57): Same comment applies as in Tweedy case. Engineer had neurasthenic condition. He testified that since he had walked with cane and had dragging of the foot and was thus at trial.

Counsel says "there was no evidence of permanent injury."

Clifford Case (p. 58): Testimony showed head injury was a depression back of ear, and headaches and earaches were testified to. Physician said he would expect convulsions

> and severe periodical pains in head and general nervousness.
>
> Counsel says it appears the plaintiff was "normal and fully recovered."

The Egich case cited by plaintiff in oral argument, was considered upon petition for rehearing before this court in the New Cornelia v. Espinoza case, and this Court stated it did not affect its opinion. The case has no application here and is not contrary to the position of this defendant; it is rather in support of the interpretation of defendant since the injury in that case occurred while plaintiff was working "in and about" a mine, being underground and recovery was allowed for an injury which unquestionably occurred **about** the mine; also, this Court would not be affected by any alleged and uncertain change in decision unless and until the U. S. Supreme Court changes its decision with reference to the necessity that an accident be due to **inherent** dangers of the hazardous occupation.

In the New Cornelia case the personnel of the Court was the same as in this case and extended quotations or interpretations are unnecessary, but the following further show that it considered the provisions of the Law relative to **accidents due to inherent risks and conditions of employment in and about a mine** to be effective and restrictive of recovery to accidents so due and occuring:

"It was necessary for the deceased to be in dangerous proximity to at least one of these explosives when he was at work **in the mine**, where such explosives were being used by the defendant in prosecuting its **mining operations**; but the deceased was not at work **in the mine** at the time of the explosion causing his death, and he was not in dangerous proximity to the explosives being used **in the mine.** He was on the surface, where **no mining operations were being carried on** by the defendant * * * The hazardous occupation in which the deceased was engaged was **in the mine**, and **not on the surface.**"

This last clause seems decisive; although the plaintiff's regular occupation was hazardous because "in and about" the mine, he was **not** in a hazardous occupation when on the surface and near or in the vicinity of the mine, where there are of necessity certain operations or work being carried on incidental to the hazardous work **in and about** the mine; "the deceased * * * was not at work either in or about the mine at the time of the accident." This is a clear and decisive statement that this court does not interpret the clause "all work in and about" to include work that is merely in the indefinite vicinity, even where, as in the New Cornelia case the work in the immediate vicinity was intrinsically hazardous. And further, "the risk or hazard which the deceased incurred in being near

the fire on the surface **was not a risk or hazard inherent in the work in the mine.**"

This Court kept in mind the provisions of the Arizona Constitution and of Sec. 3154, R. S. A., which restrict the unlimited liability to "all hazardous occupations **in** mining and smelting," and that the subordinate clause of Sec. 3156 "all work in and about " was to be interpreted reasonably and harmoniously with the Constitutional and Legislative declaration and intent to apply the Act only to such occupations about mines and smelters as were hazardous because of inherent dangers and to accidents due to conditions of employment in such inherently dangerous occupations in mining and smelting.

It is submitted that this defendant asks only for the correct, legal and not unreasonable or inequitable construction of the law, in its position that this employee of a mining company, who was not employed in or about a mine or a smelter, or upon machinery or under conditions declared hazardous in construction work, is not within the Arizona Employers' Liability Law. And especially not when an accident occurs that is not remotely caused by an inherent hazard or due t o a condition or conditions of employment in any hazardous occupation in mining, smelting and the like. This is not a case where sympathy for physical injury enters. Many are the cases calling for sympathy and in which the injured has no legal remedy or seeks none. In this case the common law remedy was open to the

plaintiff, if his facts could support an action thereunder. This case rather, it seems to the defendant, calls for that statesmanlike construction which is peculiarly to be expected of the Federal Courts, and to be based upon the Constitution and Laws of Arizona and the decisions especially of this court and of the supreme court of the United States and the evident purpose and intent as shown in the opinions thereof. The question thus raised is whether this Constitution and the Law, taken in connection with the decisions and opinions of the said Courts upon this Law, contemplate that an employee whose work is pick and shovel and other miscellaneous work around on the grounds of an employer who at times conducts or intends to conduct in some buildings on said ground smelting or other operations declared hazardous, but to hazards of which the employee is not subjected, is in a hazardous occupation; whether an accident occurring while such an employee is doing a piece of small construction work, such work not reaching that magnitude which would bring it within the specific provisions of the law relating to and declaring construction to be hazardous under certain conditions, Sec. 3156 (5), is due to a condition or conditions of, and an inherent risk in, eny employment in mining, smelting or other occupations having inherent risks and conditions as provided by the Constitution and declaratory Law. Manifestly this employee engaged upon the work

he was employed regularly to do and which he was doing at the time of injury, was no more subjected to inherent risks, conditions or hazards of any occupation in mining, smelting or machinery, deemed hazardous under the Constitution and Law, than an employee engaged to do similar pick and shovel work around the grounds and buildings of a school or university. If the Court were to take the attitude, which we urge cannot be taken in this case under its own decision and a fair construction of the Law, that work not "in and about" a smelter may be construed or found to be incidental to smelting and to come within smelting, it is submitted that this particular work could not be so regarded as incidental, but has the same relation as work of constructing a railroad to the smelter, work building hotels and houses for employees, manual work in the hotels, (and in fact mining itself, because mining is necessary before any smelting can be done); all of which are manifestly outside mining and smelting and operation as contemplated by the Employers' Liability Law.

Such a construction would also defeat the limitations stated in the decision in the Hammer case, which clearly shows the determination of the Supreme Court that recovery is only for accidents attributable to "hazards inherent in" and "due to its inherent conditions." The opinion of this Court in the New Cornelia v. Espinoza case, where it quotes with approval the Mathews case and denied a pe-

tition for rehearing based upon an opinion in the Egich case, shows also that this Court considers the unique and distinctive clauses of the Arizona Law to be an inherent part of that law and are not to be brushed aside as surplusage; especially in view of the unlimited liability permitted by that Law and of the five to four decision in the Hammer case, where these unique portions were considered and given effect.

We quote as follows from the Hammer case, 63 L. Ed. 1058:

"In effect the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee **attributable to hazards inherent in the employment** and due to its conditions. (p. 1067) * * *

"We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and **due to its inherent conditions,** exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer (p. 1067) * * *

"To the suggestion that the act now or hereafter may be extended by construction to **nonhazardous occupations,** it may be replied: first, that the occupations in which these actions arose were indisput-

ably hazardous; hence plaintiffs in error have no standing to raise the question; and secondly, it hardly is necessary to add that employers in nonhazardous industries are in little danger from the act, **since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.**" (p. 1070).

We respectfully urge that the assurance that there is no danger of the act being extended by construction to nonhazardous occupations because it imposes liability only for accidental injuries attributable to the **inherent dangers** of the occupation, will be totally defeated and overruled if, as in this case, a jury upon uncontradicted and admitted facts can be permitted to become the final judges of the law and its construction and to thus as a finding of fact extend the statute to accidents in an occupation of an employee which is essentially nonhazardous and which accidents are not attributable to inherent dangers or conditions of or "in and about" occupations in mining, machinery in plants, and the like, as such occupations are contemplated by the Constitution of Arizona. What meaning or force could that statement in the Hammer case have, if each jury may find, on admitted facts, as a fact or a matter of law whether or not **any** accident in an alleged hazardous occupation occurs in a hazardous occupation and is due to an **inherent danger,** or is to be the unregulated judge of whether the facts, when admitted, constitute an ac-

cident in a hazardous occupation and due to inherent dangers; or if "inherent" is in effect disregarded.

Also, if the contention of plaintiff were true that the Arizona Supreme Court in the Egich case has discarded its former position as stated in the Mathews case, namely, that it is essential an accident be due to inherent dangers and to conditions of the employment in hazardous occupations, then it would appear the Court has withdrawn one of the bases or props upon which the Supreme Court of the United States by the narrow decision declared the Arizona Employment Liability Law constitutional in the Hammer case, thereby re-opening that question. We therefore do not believe the Egich case should be construed as contended for, but if it is so construed it attempts to overrule the United States Supreme Court and could have no effect upon this Court so far as the case at bar is concerned.

In consideration of the questions presented it must be borne in mind that there is no other enactment which contains the unique and distinctive conditions of the Arizona Law and especially that the injury (Sec. 3154, R. S. A) "must be due to a **condition or conditions of such (hazardous) occupation,**" in addition to the type form enactments providing for accidents "arising out of or in the course **of the employment or occupation.**" This, the Su-

preme Court of Arizona in the Mathews case and this Court in the New Cornelia case, clearly recognize.

This defendant therefore respectfully submits, as set forth in its Motion in Arrest of Judgment and Assignment 20, that under the Constitution of Arizona and of the United States, and decisions of the Arizona Supreme Court, of this Court, and of the U. S. Supreme Court, this judgment deprives the defendant of property without due process of law, and it should be reversed.

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